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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CLETUS BROWN,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTION PRESENTED

The question presented for review is whether or not the provisions of the Railway Labor Act, 45 U.S.C.A. Section 151, *et seq.*, preempt all State Court actions by a railroad employee against his employer for intentional harrassment.

PARTIES

The parties hereto are Cletus Brown, Petitioner and Plaintiff below and Missouri Pacific Railroad Company, Defendant below.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The petitioner seeks review of the decision of the Missouri Supreme Court, which was rendered on November 18, 1986, petition for rehearing denied, December 16, 1986.

OPINIONS BELOW

This case has been decided by the Supreme Court of Missouri in *Brown v. Missouri Pacific Railroad Company,* 720 S.W.2d 357 (Mo. banc. 1986). The case had been transferred to the Supreme Court for decision by the Missouri Court of Appeals, Eastern District, in an opinion without decision, *Brown v. Missouri Pacific Railroad Co.,* Missouri Court of Appeals, Eastern District, Division Two, Cause No. 50528.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to U. S. Supreme Court Rule 17 (b) and (c), 28 U.S.C.A., because the decision of the Supreme Court of Missouri herein is in conflict with the holding of the Supreme Court of Minnesota in *Pikop v. Burlington Northern Railroad Company,* 390 N.W.2d 743 (Minn. 1986). Further, the State Court has decided an important question of Federal law which has not been but should be settled by this Court and has decided a Federal question in a way which conflicts with the applicable decisions of this Court.

STATUTES INVOLVED

The issue presented herein is the extent of preemption under state law torts under 45 U.S.C.A. Section 151, *et seq.,* the Railway Labor Act. The case also presents the issue of whether an employer's retaliation for exercise of rights conferred by the Federal Employer Liability Act, 45 U.S.C.A. Section 51, *et seq.,* gives rise to a State law remedy on the part of the employee, when such conduct is not otherwise in breach of the applicable collective bargaining agreement. The applicable statutes are set out verbatim in the Appendix hereto.

STATEMENT OF FACTS

The facts which give rise to this litigation are simply stated. Cletus Brown, Petitioner herein, was, at all times relevant hereto, an employee in good standing with Defendant Missouri Pacific Railroad Company. In November 1978, Cletus Brown, while working on a railroad bridge, fell and sustained multiple fractures in his wrists, nose and back. Petitioner was off work, due to his injuries, until April 1979. He was then released from treatment, examined by a physician employed by Missouri Pacific Railroad and pronounced fit to return to duty. He did return to work.

Petitioner made an earnest attempt to settle his claim for injuries without litigation and without retaining an attorney. A claims agent with the Railroad offered Petitioner $3,000.00, plus lost wages and told him if he did not settle for this sum, he would not settle at all. The agent told Petitioner that if he hired an attorney to pursue his F.E.L.A. claim, it would be the last day that he worked for the Railroad. These threats were repeated to Petitioner, and to Petitioner's co-workers. Petitioner did, however, retain an attorney and file suit against the Railroad.

During the pendency of his litigation, Petitioner worked at his usual occupation with the Railroad. His F.E.L.A. lawsuit was filed in 1979 and ultimately tried in the Circuit Court of the City of St. Louis, State of Missouri in December 1981. The evidence in the present case is undisputed that no one complained relative to Petitioner's ability to work from the time he returned to work after recuperating from his injuries until after the trial of his F.E.L.A. claim. In December, 1981, a jury awarded Petitioner the sum of $175,000.00 for the injuries he sustained in November, 1978. The jury rendered its verdict on December 9, 1981. On December 10, 1981, Defendant's claims agent advised Petitioner's foreman that he was not to be allowed to return to work, as scheduled, on Monday December 14, 1981. Petitioner reported to work but was not allowed to work and was given no reason why he could not work. After several telephone calls, Petitioner was told that he was being held out of the service while the Railroad went through some of the statements he made in the F.E.L.A. trial. Petitioner had testified as to pain in his wrists and hands during the F.E.L.A. trial.

For two months, Petitioner was not contacted by the Railroad. He assumed that he had been terminated and asked his Union to take action to secure his reinstatement. A grievance was filed and ignored by the Railroad. Thereafter, Petitioner was informed that he would be required to undergo a

physical examination to determine whether or not he was able to perform the duties he had successfully performed for two and a half years up until the verdict was returned in his favor. Petitioner attended the examination and was pronounced fully able to work by the doctor.

Petitioner brought this suit against the Railroad in February of 1982, alleging that the threats and withholding from employment on the part of the Railroad were intentional acts undertaken for the sole purpose of punishing Petitioner for exercising rights conferred upon him by the F.E.L.A. Petitioner alleged that he suffered mental anguish, embarrassment, anxiety, humiliation, tension and worry and prayed for $75,000 actual damages. He further requested $7,500,000.00 punitive damages because the Defendant's actions were outrageous, intentionally, willfully and maliciously done and for the sole purpose of causing damage to the Petitioner and to punish Petitioner for exercising his legal rights and to deter others from exercising their legal rights provided to them by the F.E.L.A. A jury returned the prayer, $75,000.00 actual damages and $7,500,000.00 punitive damages.

Defendant Railroad has raised the defense of preemption since the inception of this lawsuit. The trial judge, on motion for judgment n.o.v., ruled against this contention. (See Appendix) The judgment was then appealed to the Missouri Court of Appeals, Eastern District, District Two, and that Court transferred the case to the Supreme Court of Missouri because of the general importance of the issues involved. (See Appendix) The Supreme Court of Missouri, upon transfer, found Petitioner's Cause of Action preempted although it did not find that the Railway Adjustment Board had the authority to provide any remedy for the conduct in question. (See Appendix) The Court further held that Congress has the primary interest in protecting employees in the exercise of their F.E.L.A. rights and that the State has no compelling interest in providing a remedy to those who are punished for exercise of such rights. In addition, the

Missouri Supreme Court has held that the bargaining agent's failure to include in the bargaining agreement protection from conduct such as has been demonstrated by the Petitioner could be construed as a waiver of protection from such retaliation for exercise of rights conferred by the F.E.L.A.

REASONS FOR GRANTING THE WRIT

The effect of the decision of the Supreme Court of Missouri in the instant case is to immunize railroads from penalty where they punish employees for exercise of F.E.L.A. rights in the manner demonstrated herein. The Supreme Court of Missouri has put a stamp of approval on a systematic campaign of retaliation carried out by a railroad against an employee solely because he exercised Federally conferred rights. The Supreme Court of Missouri has implicitly recognized that its decision herein leaves the petitioner without any remedy for the conduct demonstrated, but the Court holds that it is up to the bargaining agent, not the Courts, to protect employees in the exercise of F.E.L.A. rights.

The decision herein represents an abdication by the Courts of the State of Missouri of their responsibility to protect their citizens from unwarranted oppressive and malicious conduct. Petitioner's right to redress for on the job injury is not conferred by the collective bargaining agreement, but by Congress. The bargaining agent may not waive these rights on the part of employees. 45 U.S.C.A. Sections 55 and 60. The Supreme Court of Missouri has denied Petitioner any forum to enforce his right to bring suit under the F.E.L.A. without retaliation, even though there is no administrative remedy for the conduct in question here. As this Court has recognized, where there is no administrative remedy to enforce or recognize right, the right is of judicial cognizance. In *Steele v. L. & N. R. Co.*, 323 U.S. 192 (1944), this Court, finding that the Railway Labor Act imposed a duty of fair representation on a labor organization acting under the statute, held that Courts were available to enforce this duty. Employees had a right to be represented without discrimination as to race. The Court held, "...that right would be sacrificed or obliterated if it were without remedy which Courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction." 323 U.S. 192 at 207.

The decision herein is in conflict with the decisions by the Supreme Court of Minnesota in *Pikop v. Burlington Northern Railroad Co.*, 390 N.W.2d 743 (Minn. 1986), *Lancaster v. Burlington Northern Railroad Co.*, 773 F.2d 807 (7th Cir. 1985); *Tello v. Soo Lines, Inc.*, 772 F.2d 458 (8th Cir. 1985); and *Buell v. Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir. 1985), all of which hold that the Adjustment Board's exclusive jurisdiction is limited to contractual violations and should not be extended to areas not covered by the collective bargaining agreement. This particular area of law is in need of clarification by this honorable Court. It is submitted that the railroad industry, relying on *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), has sought to immunize itself from any significant liability for retaliation against employees for exercise of F.E.L.A. rights by merely characterizing any retaliatory action as a "minor dispute". Therefore, the industry has been free to discharge, harrass, oppress, secure in the knowledge that the only penalty which might be exacted from an employer for such conduct was reinstatement of the employee with back pay. The Adjustment Board has no authority to award any other relief. Yet, other employees, fearing similar retribution, have been chilled in the exercise of Federally conferred rights.

Petitioner submits that Congress, by enacting the Railway Labor Act, did not intend it to be used by railroads to prevent exercise of rights under the F.E.L.A., but the Supreme Court of Missouri, in this decision, is permitting and authorizing such a result. The decision of the Supreme Court of Missouri, is therefore in conflict with applicable Federal law and should be reviewed by this Court.

CONCLUSION

For the above and foregoing reasons, Petitioner herein respectfully requests that this Court issue its writ of certiorari in the instant case and examine the issues presented herein.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
CIRCUIT COURT OF THE CITY OF ST. LOUIS
DIVISION NO. 7

No. 822-00505

Cletus Brown,
Plaintiff,

vs.

Missouri Pacific Railroad Company,
Defendant.

July 31, 1985

MEMORANDUM FOR CLERK

Motion of Defendant Missouri Pacific Railroad Company for judgment notwithstanding the verdict previously argued and taken as submitted is hereby overruled. Defendant's alternative motion for a new trial previously argued and taken as submitted is hereby overruled. Memorandum in support of the Court's ruling is filed herewith.

So Ordered:

/s/ James L. Sanders, Judge

cc: Mr. Don B. Sommers
Mr. Albert E. Schoenbeck

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
DIVISION NO. 7

No. 822-00505

Cletus Brown,
Plaintiff,

vs.

Missouri Pacific Railroad Company,
Defendant.

MEMORANDUM AND ORDER OF COURT ON DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ALTERNATIVE MOTION FOR NEW TRIAL

This Court does not normally accompany its post trial rulings with memoranda except in those cases where it wants to be sure the Appellate Court knows the lower court's position. That way the Appellate Court does not have to guess or speculate about the lower court's thinking on the case. Therefore, I have set out my reasons for my ruling on the issue of pre-emption and on the issue of submissibility.

On the issue of pre-emption, the Court is of the opinion that this is not a case to which pre-emption applies. This is not a grievance that grew out of the Labor Contract. Based on the evidence most favorable to the plaintiff this involves a conscious attempt on the part of the defendant to deny the exercise of a right granted by the Congress of the United States. That right is the right to file a Federal Employers' Liability Act action as a result of injury sustained on the job.

A proper view of this case requires a view of the totality of the circumstances. The evidence in this case clearly shows that the attempt to deny this Congressional right began soon after the injury. The claims man for the defendant stated that if the plaintiff did not accept his offer he would no longer work for the

Railroad. Later the foreman and assistant foreman indicated to the plaintiff that if he files suit he will no longer work for the Railroad. Considering this evidence in the light most favorable to the plaintiff there was constant intimidation along these lines by the Railroad.

This plaintiff had the courage to file his lawsuit and pursue it to verdict. The day after the verdict he was pulled off the job. He was kept off the job for weeks without any explanation and without pay. He was not discharged. This is not a wrongful discharge case. When asked on the stand if the plaintiff was going to be paid for his time off regardless of what the results of the exam by Dr. O'Reilly, a supervisor of the defendant's, Mr. Brakensiek, replied, "Yes". When asked to explain then why he was not paid right along during that time he had no explanation. This was further evidence of the intimidation methods of the defendant.

Cletus Brown was the victim of a tort, legally independent of any contractual claim or grievance. He claims that the defendant undertook the course of action with the intent to harm him. He has not claimed any breach of contract, but rather a breach of duty owed him by the defendant to refrain from intentionally causing him harm. Nothing in the union contract prevents this defendant from acting, in accordance with that contract, with the specific intent to cause harm to plaintiff. But, Missouri law permits recovery for such conduct and plaintiff is entitled to avail himself of Missouri law. In Balzheit v. Southern Pacific Transportation Company, 569 F.Supp. 986, that court upheld the right of plaintiff to sue in State Court on his claims for emotional distress as a result of defendant's insistance that as a condition precedent to his reinstatement after an injury on the job, he discharge the attorney representing him in his F.E.L.A. claim. The court specifically distinguished Magnuson, by noting that the damages sought by plaintiff did not flow from "wrongful refusal to reinstate" but rather from the alleged attempt to prevent Balzheit from continuing to retain legal counsel in pursuance of his F.E.L.A. claim.

This reasoning is equally applicable in this case. The injury done to Cletus Brown as result of concerted action by defendant intended to prevent him from retaining counsel in order to pursue his F.E.L.A. claim and subsequent attempts to punish him for having done so. Nothing in the union contract protects him from such conduct. Therefore, if Missouri permits recovery for such conduct, he may proceed directly in the State Courts of Missouri.

In the case of Farmer v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 290, that court noted "although recognition of tort of intentional infliction of emotional distress is a comparatively recent development in State law, our decisions permitting the exercise of State jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort, but rather on the nature of the State's interest in protecting the health and well being of its citizens".

For the defendant to argue that this is a "minor dispute" is in the opinion of this Court a self-serving statement. For the defendant to argue that the plaintiff could seek reinstatement under the union contract is to deny their own position that he was never discharged. To argue that the grievance procedure provides a remedy would mean that the Railroad could intimidate to their heart's content and all they would ever have to do would be to return him to work and pay his wages. This type of conduct is not covered by the union contract, not contemplated by the contract and certainly not a minor dispute. The jury held it to be outrageous conduct which is exactly what this cause of action was meant to cover.

The defendant further argued that Prima Facie Tort and Outrage has been criticized by the Appellate Court. That is a matter for the Appellate Court. However, in the opinion of this Court if the Courts are recognizing Prima Facie Tort and Outrage and if the evidence is to be believed, and the jury did believe it in this case, then this certainly is a case of outrage.

The motion for a judgment notwithstanding the verdict is hereby overruled.

MOTION FOR NEW TRIAL

The only issue on the motion for new trial that I want to include in this memorandum is the issue of whether a submissible case was made. The four elements of this cause of action are 1) An intentional lawful act, 2) The intent to injure, 3) Injury and 4) Lack of jurisdiction or insufficient justification. The intentional lawful acts were the threats and the withholding from work. The intent to injure was the intent that the plaintiff not exercise his Congressionally granted right of filing an F.E.L.A. The injury was that for three and a half months after trial of his F.E.L.A. action he was left in limbo as to his job status. He was further left in limbo as to his future and he was afraid to think that would happen to him, and further that he was the subject of discussion among his fellow employees, who were told he would never return to work. Finally the issue of justification was for the jury.

The motion for new trial is overruled.

So Ordered:

/s/ James L. Sanders, Judge

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. 50528

Cletus Brown,
Plaintiff-Respondent,

vs.

Missouri Pacific Railroad Co.,
Defendant-Appellant.

Appeal from the Circuit Court of the
City of St. Louis
Hon. James L. Sanders

OPINION FILED: June 24, 1986

PER CURIAM:

Plaintiff brought this action for intentional tort under the prima facie tort doctrine, and obtained a judgment in accordance with a jury verdict of $75,000 compensatory and $7,500,000 punitive damages. On appeal, defendant enumerates six points relied on, containing numerous subpoints. This case involves substantial questions regarding the preemption of state tort claims by the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which all of the participating judges believe warrant transfer to the Supreme Court of Missouri.

Plaintiff was employed by defendant as a "Bridge and Building" carpenter. While working on a railroad bridge, he fell from a scaffold and suffered multiple fractures in his wrists, nose, and back. Plaintiff was treated for his injuries at Barnes

Hospital and was released by his treating physician to return to his job in April 1979, approximately five months after the accident. He was also given a complete physical and released to resume work by Dr. R. B. Duncan, a physician who performs physical examinations for the Missouri Pacific Railroad.

Plaintiff subsequently brought suit against defendant under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1982), and received a judgment after a jury trial in the amount of $175,000. Prior to obtaining an attorney in connection with the FELA claim, plaintiff was told by defendant's claim agent that if he sought help from a lawyer it would be the last day he worked for the railroad. The threat was repeated later, and plaintiff was told that if he did not settle with the agent, who offered him $3,000 plus lost wages, "[he] would not settle at all." Shortly thereafter plaintiff consulted Ron Little, an attorney, who told him to attempt to settle again; and plaintiff called defendant's claim agent from Mr. Little's office. Defendant's agent began threatening plaintiff during that conversation, at which point Mr. Little picked up another phone and overheard the agent say "if you [plaintiff] sign papers with the lawyers, that will be the last day you work on the railroad." Similar threats and statements regarding plaintiff's future with the railroad were made to plaintiff's co-workers. One employee, Barry Hoots, was told by plaintiff's foreman, L. D. Harrison, that "if [plaintiff] ever did have a suit and...for some reason they did let him come back to work, ... the company would fire him the first chance they got on some small rule violation."

During the period between April 1979, when plaintiff returned to work following his accident, and December 7, 1981, when his FELA suit was tried, no one complained to him or questioned his ability to perform his assigned tasks. On December 10, 1981, the day after the jury in the FELA case returned a verdict in favor of plaintiff, L. D. Harrison received a telephone call from defendant's chief claims agent in St. Louis. After that conversation, Harrison told Larry Hoots that "Clete [plaintiff]

will never come back to work." Harrison gave a note to the relief foreman which stated that plaintiff was not to be allowed to return to work on Monday, December 14, 1981, and that he was to turn in his company keys. Gerard Bader, the relief foreman, testified that he was unaware of any instance where an employee that was going to be retained was required to turn in his keys. Plaintiff testified that he had not been required to do so during layoffs.

When plaintiff reported to Bader the following Monday, Bader informed him that he "couldn't go to work," and showed him the note. Bader could offer him no further explanation and suggested that he "call St. Louis." Plaintiff then called W. E. Brakensiek, who was in charge of the "Bridge and Building" employees, and asked why he was not allowed to work. Brakensiek said that he did not know, and referred him to Mr. Longo, defendant's district claims agent. Mr. Longo proved to be of no more assistance in plaintiff's inquiry, and told him to talk to Brakensiek again. Plaintiff testified that Brakensiek finally informed him that he was not fired, but "the reason we are holding you from working is that we're going through some of the statements you made in the [FELA] trial," and "we'll get in touch with you." No mention was made at that time of plaintiff undergoing a physical examination.

In his FELA testimony, plaintiff stated that he had "a lot of pain in his wrists and hands," and had limited motion in those joints with respect to "up and down and. . .turning, rolling over and rolling out." He testified that he "can lift basically, but it's with a lot of pain and difficulty. Some types of jobs, I can't lift the way I did." He further indicated that he had some difficulty using his tools, and said:

> I have sharp pains if something gives that I haven't anticipated on moving or giving, and I have a strain on my hands. The pain is so sharp that I will sometimes even drop my tools.

He testified that his neck, shoulders and back hurt all the time and that his pain had "gotten worse." Additionally, he stated that he held his chain saw differently than he did before his accident, and that:

> I lift a lot differently than I used to. I usually have to lift slowly now; position myself to where if the pain does hit me, I can get out of the way and move to protect myself. And I am not as sure as I used to be of my work, either, because I do have the pain.

During the month following the FELA trial, Longo obtained a transcript of plaintiff's testimony, and sent a letter containing excerpts from that transcript to Dr. Rouse, Chief Medical Officer of the Missouri Pacific Railroad, for his evaluation. Longo received a reply from Dr. Rouse's assistant which suggested a current orthopedic consultation to ascertain plaintiff's condition. An appointment for plaintiff to be examined by Dr. O'Reilly was scheduled for March 9, 1982, of which plaintiff was notified by letter on February 12, 1982. Dr. O'Reilly reported, after examining plaintiff, that he had made an "excellent recovery" from his injuries and that he should be able to "carry out his regular occupation of B and B carpenter."

Between December 14, 1981, and the February 12, 1982, letter regarding the orthopedic examination, plaintiff received no information about his employment status. He contacted his union chairman, Roscoe Harris, on January 20 and requested assistance. Mr. Harris wrote a grievance letter on plaintiff's behalf dated January 25, 1982, contending that defendant had violated the collective bargaining agreement between defendant and plaintiff's union, The Brotherhood of Maintenance of Way Employees. The letter specifically referred to Rule 12, which provides in pertinent part:

> Section 1. (a) An employee who has been in service more than sixty (60) days shall not be disciplined or dismissed without investigation. He may, however, be

> held out of service pending such investigation which will be held within a reasonable time.
>
> (b)...he shall be advised of the precise charge in writing and the time, date, and place set for the investigation. The employee shall have a reasonable opportunity by this notice to secure the presence of necessary witnesses, and representation if he so desires.

In the grievance letter, Mr. Harris requested that plaintiff be reinstated with his rights unimpaired, and that he be paid the wages he had lost.

On January 21, 1982, upon the advice of his attorney, plaintiff also requested a "service letter" setting forth his status, rate of pay, length of employment, and reason for termination. Plaintiff received no response to this request.

On March 25, 1982, he was notified by letter that after reviewing the report on Dr. O'Reilly's examination, defendant had determined that plaintiff could resume his job and would be reimbursed for lost wages from December 14, 1981, up to and including the last day his "seniority would have allowed him to work [in light of recent layoffs], February 11, 1982." Plaintiff was further informed that "as soon as business conditions improve" he would be recalled to work in line with his seniority. "Until recalled to work [he would] remain in the status of a furloughed employee with the Missouri Pacific Railroad Company."

Prior to his examination and subsequent reinstatement on February 17, 1982, plaintiff filed a petition setting forth the claim we are confronted with here. In his first amended petition he alleged that defendant had "threatened plaintiff with loss of his employment and harassed, humiliated and embarrassed plaintiff during the course of his employment for the sole purpose of punishing plaintiff for exercising his rights under the FELA." He asserted that "there is no sufficient justification

for any of the aforementioned actions of defendant." He further alleged that he had suffered "mental anguish, embarrassment, anxiety, humiliation, tension, worry and loss of income" for which he requested $750,000 in damages. He further requested $7,500,000 in punitive damages because the defendant's actions were "outrageous, intentionally, willfully and maliciously done for the sole purpose of causing damage to plaintiff and to punish plaintiff for exercising his legal rights and to deter others from exercising their legal rights provided to them by the [FELA]."

Defendant alleged, as an affirmative defense, that the court lacked jurisdiction because plaintiff's exclusive remedies were under the collective bargaining agreement and the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (1982). In support of this contention, defendant introduced the agreement into evidence, and adduced testimony from Wayne Naro, after the verdict for plaintiff had been returned by the jury, to assist the court in resolving the legal question of preemption.

Mr. Naro, an attorney who is employed as defendant's Director of Labor Relations for the Maintenance of Way and Signals Department, testified that the agreement covered: wages; working hours; general working conditions; grievance procedures; discipline; seniority; and fringe benefits. He further stated that an employee subjected to harassment or threats of discharge can seek redress through grievance procedures, and that the National Railroad Adjustment Board could consider allegations of retaliatory discharge. However, he testified that no specific rule in the agreement prohibited defendant from withholding an employee from service in retaliation for the exercise of FELA rights, and that no rule prohibited threats. He also believed that damages over and above lost wages are not cognizable under the RLA.

Defendant argues, with the support of numerous citations and much authority, that the court "erred in refusing to dismiss

the plaintiff's petition because the Railway Labor Act [45 U.S.C. § 151, *et seq.* (1982)] preempts the circuit court's jurisdiction over the plaintiff's state tort claim." The main provision of the agreement upon which defendant relies is Rule 12, quoted previously, dealing with discipline and discharge. Defendant asserts that plaintiff's allegations, if accepted, indicate violations of that Rule.

> The RLA:
>
> provides for the submission of all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions" to arbitration by either the National Railroad Adjustment Board, established by the act, or a Public Law Board, created by the railroad and the unions. 45 U.S.C. § 153 First (i).

Barchers v. Missouri Pacific R. Co., 669 S.W.2d 235, 237 (Mo. App. 1984). Conflicts falling within the ambit of the language quoted above are known as "minor disputes" to distinguish them from disputes over the formation or alteration of collective bargaining agreements, which are more likely to result in strikes. *See,* Elgin, Joliet & Eastern R. Co. v. Burley, 325 U. S. 711, 724-725, 65 S.Ct. 1276, 1290, 89 L.Ed.2d 1886, 1894-1895 (1945). It is well settled that if a claim is properly characterized as a "minor dispute," state law is preempted and the RLA provides the claimant's exclusive remedy. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1368 (9th Cir. 1978).

The broad interpretation applied to the "minor dispute" category and the extensive range of RLA preemption are well illustrated by recent decisions of this court. In *Barchers, supra,* and its companion case, Alsbury v. Missouri Pacific R. Co., 670 S.W.2d 87 (Mo. App. 1984), we found libel actions brought by railroad employees against their employer preempted. We said in *Barchers* that:

> This libel, occurring in the process of adjusting a grievance, depends "on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement of the RLA," Magnuson v. Burlington Northern, Inc., 576 F.2d at 1369. It bears a substantial relationship to the agreement and is thus, exclusively subject to the procedures of the Railway Labor Act.

669 S.W.2d at 237-238. In a case closely analogous to the instant one, Burkin v. Burlington Northern Railroad Company, 690 S.W.2d 508 (Mo. App. 1985), we held that plaintiff's state tort action was properly dismissed. The petition in that case "read broadly, attempt[ed] to state a claim for intentional tort, emotional distress and/or wrongful discharge." *Id.* Among plaintiff's contentions in that case was that defendant sought to deter plaintiff and others from seeking redress for injuries. We stated: "[a]rtful pleading does not change the fact that this is a 'minor dispute' cognizable under RLA, 45 U.S.C. § 151 *et seq.* (1982)."

However, plaintiff seeks to avoid preemption by relying on the exception to the preemption doctrine delineated in Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). In *Farmer,* the U.S. Supreme Court held that plaintiff's claim of intentional infliction of emotional distress was not preempted by the National Labor Relations Act, 29 U.S.C.A., § 51, *et seq.* The Court pointed out that generally state jurisdiction has been preempted in regard to activities "protected by § 7 of the National Labor Relations Act, or constitut[ing] an unfair labor practice under § 8 . . ." 97 S.Ct. at 1061. The court went on to say that:

> Our cases indicate, however, that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue

> and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

Id. at 1064. The court examined the factors that had influenced previous departures from the preemption doctrine, which may be paraphrased as follows: 1) Did Congress intend to protect the underlying conduct; 2) Is there an "overriding state interest" "deeply rooted in local feeling and responsibility"; and 3) How great is the risk that the state cause of action would interfere with the effective administration of national labor policy? *Id.* at 1062. The court held that:

> On balance, we cannot conclude that Congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case. [intentional infliction of emotional distress]. At the same time, we reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. . . .Simply stated, it is essential that the state tort be either unrelated to employment discrimination [the unfair labor practice involved in *Farmer*] or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

Id. at 1066.

While *Farmer* involved the NLRA, its language is broad and applicable to other federal labor regulations as well. Recent decisions in other courts have applied the *Farmer* exception to state tort claims, similar to the one at bar, which were allegedly preempted by the RLA. *See, e.g.*, DeTomaso v. Pan American World Airways, Inc., 220 Cal. Rptr. 493 (Cal. App. 1985)

[claim of intentional infliction of emotional distress and defamation not preempted by the RLA]; Gulati v. Burlington Northern Railroad Company, 364 N.W.2d 446 (Minn. 1985), *review granted* [claim of intentional infliction of emotional distress, insofar as it was not a result of discharge, not preempted by RLA]; Balzeit v. Southern Pacific Transportation Company, 569 F.Supp. 986 (N.D. Cal. 1983) [claim of intentional infliction of emotional distress not preempted by RLA]. *See* also, Raybourn v. Burlington Northern Railroad Company, 602 F.Supp. 385 (W.D. Mo. 1985) [claim of false imprisonment not preempted by RLA].

We recognize that the great weight of authority in this country supports the defendant on the issue of preemption. However, the *Farmer* case appears to open the door for certain state tort actions; and it is arguable that plaintiff's claim falls within the limited *Farmer* exception. Because of our previous decisions in *Barchers, Burkin,* and *Alsbury,* in which tort claims somewhat similar to plaintiff's were found to be preempted by the RLA, we would be constrained to follow that precedent and reverse on this issue. *Barchers,* 669 S.W.2d at 235; *Alsbury,* 670 S.W.2d at 87; *Burkin,* 690 S.W.2d at 508.

However, since those decisions two state courts have considered the issue of preemption and found tort claims unconnected with wrongful discharge not preempted. *DeTomaso,* 220 Cal.Rptr. at 493; *Gulati,* 364 N.W.2d at 446. Because of the persuasive reasoning in *DeTomaso* and *Gulati,* and the general interest and importance of the issue, we conclude that this case should be transferred to the Supreme Court for resolution.[1]

Case transferred pursuant to Rule 83.02.

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[1] *DeTomaso* and *Gulati* are also presently being reviewed by the Supreme Courts in their respective states.

APPENDIX C

SUPREME COURT OF MISSOURI
EN BANC

No. 68347

Cletus Brown,
Plaintiff-Respondent,

vs.

Missouri Pacific Railroad Company,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
The Honorable James L. Sanders

The plaintiff, a long-time employee of the defendant railroad, was injured in a fall. He sued and recovered damages under the Federal Employer's Liability Act. He then filed suit in the Circuit Court of the City of St. Louis charging that the defendant, through its supervisory employees and claims agents, had undertaken systematic retaliatory harassment by threatening him with discharge if he filed suit and then holding him out of service pending an unneeded physical examination after he recovered judgment. The action was characterized a one in "prima facie tort." The plaintiff recovered a large judgment for actual and punitive damages. The Court of Appeals, Eastern District, transferred the case here without express resolution, because of uncertainty as to whether the plaintiff's claim was preempted by the Railway Labor Act. We take the case on original appeal and reverse outright, concluding (1) that the action is preempted by the Railway Labor Act and is within the exclusive jurisdiction of the appropriate division of the National Railroad Adjustment Board, established by that act, and, (2) that the plaintiff has failed to plead and prove a cognizable claim in prima facie tort under Missouri law.

1. The Plaintiff's Theory

The plaintiff characterizes his action as one in prima facie tort. The evidence showed that, after the plaintiff was injured, he was repeatedly told by a claim agent that he would never work another day for the railroad if he retained a lawyer and filed suit to recover for his injury. A supervisor told other employees that the plaintiff would be fired if he sued. The plaintiff nevertheless retained a lawyer, and the claim agent told the lawyer over the telephone that the plaintiff would be discharged if he did not settle with him. The most that was offered him was $3000 plus lost wages. His suit proceeded to trial and he recovered a judgment of $175,000, which was quickly paid. Following the trial, the plaintiff was held out of service without explanation and was treated as though he was going to be fired. He had difficulty in obtaining an explanation, but was belatedly told that the railroad wanted a further physical examination because of his trial testimony, in which he said that he sometimes dropped tools because of the injury to his wrists. The plaintiff got in touch with his union representative and filed a grievance for lost wages for the period during which he was held out of service. The railroad finally scheduled an examination by an orthopedic surgeon of its choice, who cleared the plaintiff for return to work. The plaintiff was allowed to return and all lost wages were restored him. The grievance before the National Railroad Adjustment Board was abandoned. The plaintiff made no attempt at trial to prove any tangible damages, by his own testimony or otherwise.

The plaintiff's verdict director read as follows:

INSTRUCTION NO. 5

Your verdict must be for plaintiff, if you believe:

First, employees of defendant acting within the scope and course of their employment by defendant threatened to discharge plaintiff if he sued defendant for injuries and

withheld him from his employment after the trial of his lawsuit, and;

Second, defendant's employees intended to cause injury to plaintiff, and;

Third, plaintiff was injured, and;

Fourth, there was no justification or an insufficient justification for the acts of defendant's employees.

Acts were within the 'scope and course of employment' as that phrase is used in this instruction even though not specifically authorized by Missouri Pacific Railroad if:

1. they were done by the employees to further the interests of Missouri Pacific Railroad under the general authority and direction of Missouri Pacific Railroad, and

2. they naturally arose from the performance of the employees' work.

The jury returned a verdict for $75,000 actual damages and $7,500,000 punitive damages. The trial judge overruled post-trial motions, accompanying his order with an opinion explaining the basis for his rulings for the guidance of appellate courts. The defendant appealed, raising numerous points. We find it necessary to consider only two of these.

2. Federal Preemption

Labor relations in the railroad industry are strongly impacted by special federal legislation. Injuries are covered by the Federal Employer's Liability Act, 45 U.S.C. §§ 51-60 (1982), to the exclusion of state workers' compensation statutes. Representation and collective bargaining are regulated by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982), and the National Labor Relations Act, 29 U.S.C. §§ 151-187 (1982), has no application.

The Railway Labor Act allows employees to select their own collective bargaining representatives. Employers are obliged to bargain, and the results of bargaining must be memoralized in formal agreements. The act provides methods of dispute resolution. The caselaw employs unfortunate terminology in classifying disputes into "major" disputes, relating to contract negotiations over "wages, hours and working conditions," and "minor" disputes, which relate to the interpretation and application of collective bargaining agreements in defining the rights of individual employees. A compulsory arbitration tribunal, the National Railroad Adjustment Board (NRAB), is established for the resolution of these minor disputes, so that there will be no interruption of service. The entire process is described in detail in opinions of the Supreme Court of the United States.[1]

The sole remedy for discharge is before the NRAB.[2] Cases consistently hold that even a discharge in retaliation for the filing of an FELA claim is within the jurisdiction of that board, and may not be made the subject of an independent civil action.[3] The defendant argues from these holdings that the plaintiff's contentions constitute a minor dispute which may not be made the subject of a common law action.

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[1] *See, e.g., Brotherhood of Locomotive Engineers v. Louisville & N. R.R.*, 373 U.S. 33 (1963); *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959); *Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711 (1945).

[2] *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972), *overruling Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941).

[3] *Landfried v. Terminal R.R. Ass'n*, 721 F.2d 254 (8th Cir. 1983), *cert. denied*, 466 U.S. 928 (1984); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Bay v. Western Pac. R.R. Co.*, 595 F.2d 514 (9th Cir. 1979).

The plaintiff makes it clear that he is not seeking a monetary award for discharge, or even for suspension, but rather is seeking damages for harassment for which, he asserts, no remedy is available before the NRAB. He admits that any claim for discharge, or for loss of wages, would be preempted by the Railway Labor Act.

The Court of Appeals observed that Missouri courts have invariably sustained claims of federal preemption when attempts have been made to sue for damages arising out of disputes between railroad employers and their employees.[4] It transferred the case here because of several recent cases adduced by the plaintiff which suggest that the state courts might have a broader role than has been indicated in the past. These cases bear careful consideration.

Farmer v. United Brotherhood of Carpenters and Joiners of America, 430 U.S. 290 (1977), was an action by a craftsman against a union for "intentional infliction of emotional distress," involving "outrageous conduct". The case had nothing to do with the railroad industry, but it was argued that it was within the exclusive jurisdiction of the National Labor Relations Board because the plaintiff's complaint included charges of discrimination in hiring hall referrals which might have been the subject of an unfair labor practice charge under the act. The court held that the plaintiff could proceed in the state court, because the National Labor Relations Act provided no remedy for the claim of outrageous conduct. The case does not give a complete answer to the contentions before us because the National Labor Relations Act is much less impacting than

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[4] *Burkin v. Burlington Northern R.R.*, 690 S.W.2d 508 (Mo. App. 1985); *Alsbury v. Missouri Pac. R.R.*, 670 S.W.2d 87 (Mo. App. 1984); *Barchers v. Missouri Pac. R.R.*, 669 S.W.2d 235 (Mo. App. 1984).

the Railway Labor Act.[5] The plaintiff in ths case introduced no evidence of intentional infliction of emotional distress or outrageous conduct, and did not submit either of these theories to the jury.

The plaintiff places strong reliance on two state cases involving employees covered by the Railway Labor Act. *DeTomaso v. Pan American World Airlines, Inc.*, 220 Cal. Rptr. 493 (Cal. App. 1985) now pending before the Supreme Court of California, held that an employee could proceed in state court against his employer (an airline, subject to the Railway Labor Act), on a claim containing elements of defamation, intentional infliction of emotional distress and breach of warranty of title. The employee had purchased a salvage lot from the employer. He was accused of theft and discharged from his job when it was discovered that the lot included property of the carrier which had not been lost or abandoned. The case is not very close to this one. It had its origin in an activity of the employee which was not related to his employment. He had his remedy before the Adjustment Board for wrongful discharge, and was ordered reinstated. The balance of his claim was of a nature which was quite appropriate for tort action.

Pikop v. Burlington Northern Railroad Co., 390 N.W.2d 743 (Minn. 1986) involved two consolidated appeals for intentional infliction of emotional distress, a tort recognized by Minnesota law. One of the plaintiffs, a woman, claimed that employees, with the employer's acquiescence, harassed her through sexually

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[5] *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1169 (4th Cir. 1985), *cert. denied*, ____ U.S. ____ (1985) ("The RLA has made 'any grievance' arising out of the collective bargaining agreement subject to exclusive arbitral remedies. *See* 45 U.S.C. § 153 First (i) (1982). In contrast the NLRA is limited to specific conduct subject to either protection or prohibition by specific conduct subject to either protection or prohibition by 29 U.S.C. §§ 157-158 (1982)." *Id.* at n. 18); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

oriented expletives, displayed rat carcasses in her presence, and otherwise inflicted indignities upon her, causing emotional problems which required psychiatric treatment. She combined her state claim with a suit under FELA. The other plaintiff alleged a constant course of harassment, also by employees with the employer's indifference, through ethnic slurs, false accusations, practical jokes, and searches of his locker, after which he suffered a heart attack. The Minnesota court held that the state had an interest in providing a remedy for conduct which is "extreme and outrageous" and "intentional and reckless," and that the allowance of a state remedy for such conduct would not interfere with the collective bargaining process of the RLA. Here, in contrast to the California and Minnesota cases, and to *Farmer,* outrageous conduct was neither shown by the evidence nor submitted to the jury,and there was no evidence of physical or mental injury.

The plaintiff also cites two recent federal cases holding that there may be recovery for emotional injury inflicted by a railroad employer on an employee under FELA.[6] These are not helpful to the plaintiff. The scope of FELA, the definition of "injury" under that act, and the relationship of the several remedies conferred by the pertinent federal statutes, are pure questions of federal law. This plaintiff made no attempt to state a FELA claim for the conduct alleged in his present petition, although there is no impediment to the joinder of an FELA claim with a claim of "prima facie tort." Likewise not helpful to the plaintiff is *Tello v. Soo Line R.R. Co.,* 772 F.2d 458 (8th Cir. 1985), which holds that a civil action may be maintained when the scope of a FELA release is in issue.

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[6] *Buell v. Atchison, T. & S. F. Rwy.,* 771 F.2d 1320 (9th Cir. 1985), *cert. granted,* ____ U.S. ____ (1986); *Lancaster v. Norfolk & W. Rwy.,* 773 F.2d 807 (7th Cir. 1985), *petition for cert. filed,* 55 U.S.L.W. 3075 (1986).

The cases just discussed are clearly distinguishable from this one. We do not have to decide whether we would agree or disagree with the results on their particular facts. The conduct shown by the plaintiff's evidence is all closely related to his employment. No element of personal abuse, such as formed the essence of the California and Minnesota cases, was claimed or demonstrated.

Had the plaintiff been discharged improperly, furthermore, there would have been a clear remedy before the NRAB, and no other remedy. It would be strange if a threatened discharge, never carried out, should give rise to a civil action when an actual discharge would not. The request for physical examination was clearly the employer's prerogative, and the plaintiff could be held out of service until the employer was assured of his physical capacity to perform the job. Any loss of time could be the subject of a grievance before the NRAB. Here the plaintiff filed a grievance and abandoned it when he was made whole. It would likewise be strange if the plaintiff could maintain a civil action for suspension with pay, when he could not do so for pay lost through suspension.

The defendant claims that the plaintiff may prosecute a grievance through the adjustment board for the alleged harassment, and cites several adjustment board decisions.[7] The plaintiff asserts that the collective bargaining agreement is silent on questions of harassment, and that no remedy is available. We do not have to decide what remedies are available before the

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[7] *International Bhd. of Firemen & Oilers v. Burlington Northern, Inc.*, Award No. 9279 (NRAB 2d Div. 1982); *Brotherhood of Ry. Carmen v. Baltimore & O. Ry. Co.*, Award No. 8676 (NRAB 2d Div. 1981); *Brotherhood of Ry. Carment v. Washington Terminal Co.*, Award No. 8481 (NRAB 2d Div. 1980); *Brotherhood of Ry. Carmen v. Southern Pac. Transp. Co.*, Award No. 31 (Public Law Bd. No. 1946, 1980); *United Transp. Union v. Baltimore & O. R.R.*, Award No. 360 (Public Law Bd. No. 1312, 1979).

NRAB. That agency could best make the decision. Harassment which strictly relates to working conditions is the kind of thing which is manifestly subject to the collective bargaining process. If existing remedies are inadequate, the bargaining agent may negotiate for corrective contract provisions. The bargaining agent should not be able to reserve civil actions for the employees it represents, on account of matters which could be, but were not, included in the collective bargaining agreement. We can foresee serious disruption in employer-employee relations if the employer could be haled into court because an employee's supervisor has threatened him with discharge, or because the employer requests a physical examination.

We conclude that the scheme of employer-employee relations established by the Railway Labor Act might be jeopardized by sanctioning actions such as the plaintiff's. We perceive no state interest which outweighs this possibility of disruption, so as to survive the test enunciated in *Farmer, supra*. It is argued that the state has an interest in protecting employees who seek to exercise their federally-created right to sue under FELA. The United States Congress, which created that right, has the primary interest in protecting it, as our state legislature has done for employees who are discriminated against because of having prosecuted workers' compensation claims.[8] Yet, according to the uniform course of decisions, Congress considers the remedy before the NRAB for such retaliation adequate.

We therefore uphold the defendant's claim of federal preemption.

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[8] Section 287.780, RSMo 1978, provides:

> No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

3. Prima Facie Tort

Having concluded that the plaintiff's claim is preempted by federal law, we might well terminate our consideration of the case. But the present appeal comes to us after the plaintiff has had full opportunity to plead any claim he chooses, and after a full trial. We deem it appropriate in the interest of finality to consider the defendant's claim that the plaintiff has failed to establish a claim of "prima facie tort" under Missouri law.

The plaintiff chose his theory carefully. He expressly disclaims any action for breach of contract, because that would clearly place him in the area of federal preemption. He also admits that there is no evidence of "personal abuse", or "outrageous conduct", necessary to a tort claim for intentional infliction of emotional distress. The verdict directing instruction submitted the bare bones requirements of prima facie tort, as it has usually been defined.

No case resulting in a verdict for the plaintiff on a prima facie tort theory has been affirmed by the Missouri appellate courts. In *Porter v. Crawford & Co.*, 611 S.W.2d 165 (Mo. App. 1980), a case in which the defendant was alleged to have maliciously stopped payment on a draft, the cause was remanded for trial. The court discussed the theory of prima facie tort at length. Writers have suggested that there might be injuries not covered by existing categories of tort remedy for redress of which a civil action should be made available. In most other cases, the application of the doctrine has been rejected by our appellate courts.[9]

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[9] *See, e.g., Centerre Bank v. Distributors, Inc.*, 705 S.W.2d 42, 53-55 (Mo. App. 1985); *Costello v. Shelter Mutual Ins. Co.*, 697 S.W.2d 236 (Mo. App. 1985); *Dowd v. General Motors Acceptance Corp.*, 685 S.W.2d 868 (Mo. App. 1984); *Lundgerg v. Prudential Ins. Co.*, 661 S.W.2d 667 (Mo. App. 1983); *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546 (Mo. App. 1983).

This Court has considered the doctrine of prima facie tort only in *Dake v. Tuell,* 687 S.W.2d 191 (Mo. banc 1985), where the opinion spoke of the "misty shroud of prima facie tort." We held that, in the absence of a showing of statutory or contract right, an employee cannot maintain an action for wrongful discharge on a prima facie tort theory.

We find the reasoning of *Dake v. Tuell* pertinent here. The plaintiff's position is that of an employee at will, insofar as our law is concerned, because he has no contract rights which may be asserted by civil action. Inasmuch as the plaintiff would have no right of action for an actual discharge, under his chosen theory, he should have no action for threatened discharge, or for a suspension with or without pay. The employer-employee relationship is often tense. Employees not infrequently are subject to real or perceived indignities. Their normal resort is to the bargaining process and to its fruits — the collective bargaining agreement. The daily contacts of employers and employees are peculiarly unsuitable for scrutiny in a lawsuit, except where there are recognized violations of rights and cognizable injuries.

It is not necessary to consider the propriety of the cryptic verdict directing instruction for an appropriate prima facie tort case, the availability of punitive damages in such a case, or other points of error raised by the defendant. Nor do we have to enter into a discussion about the situations in which an action of prima facie tort might be available. Suffice it to say that the case before us is not one of these.

The judgment is reversed.

Charles B. Blackmar, Judge

Higgins, C.J., Billings, Welliver,
Robertson, JJ., Manford and Prewitt,
Sp.JJ., concur. Donnelly and
Rendlen, JJ., not sitting.

APPENDIX D

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

December 16, 1986

Mr. Don B. Sommers
818 Olive Street, Suite 1630
St. Louis, Missouri 63101

Re: Cletus Brown vs. Missouri Pacific Railroad Company, No. 68347

Dear Mr. Sommers:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Plff.-Resp.'s motion for rehearing overruled. Opinion modified on Court's own motion."

Very truly yours,

/s/ Thomas F. Simon, Clerk

cc: Mr. William G. Guerri
Mr. Albert E. Schoenbeck
Mr. I. Michael Greenberger

APPENDIX E

Statutes Involved

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to

exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 60. Penalty for suppression of voluntary information incident to accidents; separability of provisions

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.

45 U.S.C. § 151. Definitions; short title

When used in this chapter and for the purposes of this chapter —

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to subtitle IV of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of

Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court

of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

45 U.S.C. § 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which

each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of

this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided however,* That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of

the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at

law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set aside in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment

Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (*l*) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their

representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed

upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.